

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs at Jackson August 7, 2007

**DWIGHT DEWON GORDON v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2003-A-529 Seth Norman, Judge**

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**No. M2006-02741-CCA-R3-PC - Filed October 12, 2007**

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The petitioner, Dwight Dewon Gordon, appeals as of right the Davidson County Criminal Court's denial of his petition for post-conviction relief. On appeal, he asserts that the post-conviction court erred in concluding that his guilty plea to second degree murder was entered into knowingly and voluntarily and not as the result of the ineffective assistance of counsel. Following our review, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Richard D. Dumas, Jr., Nashville, Tennessee, attorney for appellant, Dwight Dewon Gordon.

Robert E. Cooper, Jr., Attorney General & Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Jeff Burks, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

**OPINION**

On March 21, 2003, the petitioner was indicted for felony murder and attempt to commit especially aggravated robbery. Pursuant to a negotiated plea agreement, he pled guilty to the lesser charge of second degree murder and received a sentence of twenty-two years to be served at one hundred percent. The remaining count of attempt to commit especially aggravated robbery was dismissed. The petitioner timely filed this petition for post-conviction relief, alleging that his guilty plea was not knowingly and voluntarily entered into because it was the result of ineffective assistance of trial counsel. After the appointment of counsel and proper amendment, an evidentiary hearing was held wherein the post-conviction court heard the testimony of the petitioner and his trial

counsel. Additionally, the post-conviction court reviewed the guilty plea submission hearing transcript and the Petition to Enter Plea of Guilty relevant to the petitioner's claims.

The petitioner testified that he was seventeen years old with an eighth grade education when the offense was committed. He stated that trial counsel represented him throughout the juvenile proceedings and his guilty plea in criminal court, but that he only met with trial counsel about three times during the pendency of his case. He claimed that trial counsel failed to investigate an alibi witness, Chrismon Hopper, who would have testified that the petitioner was not present when the offense was committed. He also claimed that trial counsel never explained that he would have to serve one hundred percent of his sentence before being released and that he thought he "was going to make parole or something." When confronted with his guilty plea petition, he denied ever seeing the one hundred percent service notation.

Trial counsel testified that he represented the petitioner during the nearly two year pendency of the charges. He stated that he probably met with the petitioner on eight or ten separate occasions. He opined that he would have investigated any potential alibi witnesses had the petitioner informed him of their existence. He further related that the petitioner decided to enter the plea once their independent fingerprint analysis showed that the petitioner was present in the vehicle when the victim was shot. Regarding the one hundred percent service, trial counsel repeatedly stated that he never relied upon a client's reading of a plea petition because many of them cannot read. He related that he always went over the details of a plea petition prior to recommending that a client enter a guilty plea to insure that the client understands all the elements of the plea.

The post-conviction court found that the petitioner was fully advised and understood the nature and consequences of his guilty plea and that his decision to plead guilty was based upon the incriminating fingerprint evidence found at the crime scene. The post-conviction court further found that the potential alibi witness, Hopper, did not testify at the evidentiary hearing and, therefore, the petitioner had failed to present any evidence in support of his alibi claim. The post-conviction court also noted that Hopper was a victim and a state's witness had the case gone to trial and that he had identified the petitioner as one of the perpetrators of the offense. Based upon these factual findings, the post-conviction court concluded that the petitioner had failed to prove by clear and convincing evidence his claim of ineffective assistance of counsel and denied relief.

On appeal, the petitioner alleges that his guilty plea was involuntary and unknowing due to the deficient representation he suffered at the hands of trial counsel. Specifically, he claims that trial counsel did not adequately explain the guilty plea to him and that he did not know that he would be required to serve one hundred percent of his sentence. He also claims that trial counsel failed to investigate the possibility of an alibi defense.

## **ANALYSIS**

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the

trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Furthermore, in the context of an allegation that ineffective assistance rendered a guilty plea involuntary, "the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would have not pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Our review of the post-conviction evidentiary hearing and guilty plea submission hearing leads this court to the same conclusion reached by the post-conviction court. Specifically, the petitioner testified that trial counsel failed to inform him of the details and consequences of his guilty plea with respect to the release eligibility date. The testimony of trial counsel as well as the record from the guilty plea refutes this claim. The petition to enter a plea of guilty clearly outlines the consequences of the guilty plea, including the requirement that the sentence be served at one hundred percent. The defendant acknowledged his signature on that document. This court finds disingenuous the petitioner's assertion at the evidentiary hearing that he could not remember seeing the notation

regarding release eligibility when he signed the guilty plea petition. As to the petitioner's claim that trial counsel should have investigated a potential alibi witness, the petitioner failed to present any alibi evidence to support this claim. Furthermore, the petitioner acknowledged at the guilty plea submission hearing that his alleged alibi witness, Chrismon Hopper, would have testified that he was involved in the offense and that Hopper himself was a victim as well.

We note that, as indicted, the petitioner faced a possible life sentence for the felony murder count in addition to up to a thirty year sentence for the attempt to commit especially aggravated robbery count. The state would have presented at trial incriminating physical evidence, the testimony of the accomplice, and the testimony of one of the victims regarding the petitioner's participation. As the post-conviction court so aptly stated, if he had proceeded to trial the petitioner would have faced "a wealth of damning evidence." As a result of the guilty plea, the petitioner received a twenty-two year sentence to a lesser charge and escaped any conviction for the attempt to commit especially aggravated robbery. The evidence does not preponderate against any of the post-conviction court's findings regarding the effective assistance of counsel. We conclude that the post-conviction court correctly denied post-conviction relief.

#### CONCLUSION

The petitioner has failed to meet his burden of proof regarding his allegations of ineffective assistance of counsel and his subsequent guilty plea. We conclude that the post-conviction court correctly denied the petition for post-conviction relief. Therefore, the judgment of the post-conviction court is affirmed.

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D. KELLY THOMAS, JR., JUDGE